

Petition for Reconsideration remains pending before the Chief, Allocations Branch.

Design's Allegations

Design asserts in its Request for Inquiry that the information contained in its Petition for Reconsideration raises a prima facie case of fraud upon the Commission. In support, Design provides a Declaration of Michael Bergner ("Bergner"), an attorney and radio station broker who represented BBI in the allocation proceeding. Bergner states that the amount of money that Design was willing to pay BBI to dismiss its counterproposal would have been significantly greater had Jenks also agreed to settle. Following several unsuccessful attempts to contact Jenks by mail and telephone, Bergner, on September 22, 1990, traveled to Jenks' home to personally appeal to Jenks to dismiss his counterproposal. Although Jenks flatly refused to even consider settling, Bergner states that he learned that Jenks had filed his counterproposal at the suggestion of a long-time friend, Gleamer Lee Smith ("Smith").

Design states that the connection between Jenks and Smith provides a "crucial link" in a chain of facts, which, when taken together, establish a prima facie case that Jenks did not file his counterproposal for the legitimate purpose of ultimately applying for a construction permit for a new FM station. Rather, according to Design, Jenks filed his counterproposal to aid and abet Smith and Smith's business partner, Dallas M. Tarkenton ("Tarkenton"), in their efforts to prevent Design from upgrading WQUL(FM)'s facilities and/or to force Design to sell WQUL(FM) to Tarkenton at less than market value.

According to Design, before Jenks filed his counterproposal, Tarkenton threatened to file a counterproposal unless Design paid Tarkenton money. Design further argues that after Jenks filed his counterproposal, Tarkenton offered to buy WQUL(FM) and another Design-owned station for a price that was far less than the stations would be worth if WQUL(FM) were allowed to upgrade.

Design also claims that Tarkenton has a history of abusing the Commission's processes. According to a handwriting expert retained by Design, Tarkenton "in all probability" signed the applications and amendments for his son Stephen's application for a new FM station at Lafayette, Florida (BPH-870720MU). Design also claims that Tarkenton was the undisclosed real party in his son Christopher's application for a new FM in Hogansville, Georgia. See Memorandum Opinion and Order, FCC 90M-1469 (released June 4, 1990). Design further maintains that despite the fact that Tarkenton sold Stations WMKJ(FM) and WCOH(AM), Newnan, Georgia, to his son, Dallas III, in 1985, the stations continue to operate from the father's office in Athens, Georgia.

The Responses

Jenks

Jenks states that he has known Smith for most of his adult life and has consulted Smith on several occasions about possible opportunities in the broadcasting business. Contrary to Design's allegations, Jenks maintains that he sought Smith's advice about the possibility of pursuing the allotment of a new FM channel in Bowdon and that Smith never asked, suggested, recommended, or otherwise urged him to file his counterproposal for any illegitimate purpose or to benefit anyone other than himself. Jenks also states that he does not know, has never met, and has never even spoken with Tarkenton or any of his sons.

Jenks declares that he filed his counterproposal solely out of a desire to apply for a new FM station at Bowdon. On October 31, 1991, Jenks in fact was among four applicants who filed FCC Forms 301 for a construction permit for a new FM station to serve Bowdon, Georgia.

Smith

Smith essentially corroborates Jenks' statements. Smith maintains that Jenks discussed his interest in owning a radio station before Design ever filed its petition for an upgrade of WQUL(FM)'s facilities. Smith declares that he had no knowledge of Design's plan to upgrade WQUL(FM) until after Jenks decided to pursue the concept of seeking an allotment at Bowdon. Moreover, Smith flatly denies that Tarkenton ever communicated any suggestion to him that a counterproposal should be filed for any purpose.

Tarkenton

Tarkenton states that he has never spoken to Jenks and has never directed anyone else to do so on his behalf. Tarkenton also asserts that he has no knowledge of any matter concerning Jenks' counterproposal. Tarkenton further contends that the only joint media relationship that he ever had with Smith existed from 1985 to 1990, during which time Tarkenton held a majority interest and Smith owned 5% or less in the licensee of Station WBTR(FM), Carrollton, Georgia. However, Tarkenton points out that at the time Jenks filed his counterproposal, Tarkenton and Smith had already contracted to sell WBTR(FM).

Although he concedes to having telephoned Design's president in January 1990, Tarkenton rejects the accusation that he ever made any threat to extort money from Design. Tarkenton explains that the purpose of his telephone call was to inquire whether Design would be interested in some type of time brokerage arrangement in the event Tarkenton's son, Christopher, was

successful in obtaining a construction permit for a new FM station in Hogansville, Georgia. Tarkenton also categorically denies making any offer to buy WQUL(FM) or authorizing anyone to make an offer on his behalf.

Tarkenton does not deny Design's allegation that he signed his son Stephen's application for a construction permit for a new FM station at Lafayette, Florida. Rather, Tarkenton asserts that even if there were an impropriety with regard to the Lafayette application, the most that can be said is that the application was improperly filed. Since the application has long since been voluntarily dismissed, Tarkenton claims that it would be a waste of Commission resources to investigate the matter. Moreover, according to Tarkenton, such an investigation would have no bearing on the outcome of the allocation proceeding.

Tarkenton also states that there is no basis to conclude that he was an undisclosed real party-in-interest in his son Christopher's application for a construction permit for a new FM station at Hogansville, Georgia. To the contrary, Tarkenton argues that the MO&O on which Design relies for this allegation involved a ruling by the Presiding Judge on whether the elder Tarkenton should be deposed. The MO&O does not, according to Tarkenton, find or conclude that he was an undisclosed real party to the application.

Finally, Tarkenton does not deny Design's allegation that he has failed to fulfill his pledge that there be an arms length separation between himself and his son regarding Station WCOH(AM). Rather, Tarkenton merely asserts that Design has failed to make a prima facie showing that Tarkenton has not fulfilled his pledge.

Discussion

Section 403 of the Communications Act of 1934, as amended, provides the Commission with the authority to institute a formal inquiry as to any matter within its jurisdiction. Section 403 affords the Commission broad discretion to determine whether to institute such an investigation. The Commission generally has not ordered an inquiry absent some actual basis for believing that either the Communications Act or its rules have been violated. New Continental Broadcasting Co., 53 RR 2d 1004, 1006 (1983).

The gravamen of Design's allegations is that Jenks, on behalf of Tarkenton, abused the Commission's processes by filing a "strike" counterproposal in order to obstruct Design's plan to upgrade the facilities of WQUL(FM) and/or to compel Design to sell the station for less than its potential value. Design's accusations, however, are not substantiated.

Based on the facts presented, we are unable at this time to

4. Identify the nature and extent of all interests held by Dallas Tarkenton III at the present time in any broadcast station.

5. Identify the nature and extent, if any, of Dallas M. Tarkenton's involvement in the preparation, prosecution, and disposition of Stephen Tarkenton's application for a construction permit for a new FM station at Lafayette, Florida (File No. BPH-870720MU).

6. State whether Dallas M. Tarkenton signed the application of Stephen Tarkenton for a construction permit for a new FM station at Lafayette, Florida (File No. BPH-870720MU), and describe the circumstances of

Dallas M. Tarkenton is requested to direct his response to:
Gary P. Schonman, Esq., Federal Communications Commission, Mass
Media Bureau, 2025 M Street, N.W., Suite 7212, Washington, D.C.
20554.

Sincerely,

for Charles W. Kelley
Charles W. Kelley, Chief
Enforcement Division
Mass Media Bureau

cc: (By First Class U.S. Mail)

David Tillotson
Arent, Fox, Kintner, Plotkin & Kahn
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5339
Counsel for Design Media, Inc.

Patricia A. Mahoney, Esq.
Fletcher, Heald & Hildreth
1225 Connecticut Avenue, N.W., Suite 400
Washington, D.C. 20036
Counsel for Terry C. Jenks

Edward S. O'Neill
Bryan, Cave, McPheeters & McRoberts
700 13th Street, N.W., Suite 700
Washington, D.C. 20005-3960
Counsel for Gleamer Lee Smith

ATTACHMENT 4

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

November 17, 1992

IN REPLY REFER TO:

1800C4

Certified Mail -- Return Receipt Requested

John S. Neely, Esq.
Miller & Miller
1990 M Street, N.W., Suite 760
Washington, D.C. 20036

Dear Mr. Neely:

The Commission is in receipt of your response to an official letter of inquiry, submitted February 18, 1992, on behalf of Dallas M. Tarkenton. While the response was informative, the Commission remains concerned about the nature and extent, if any, of Dallas M. Tarkenton's involvement in the various applications for FCC authorizations filed by his sons. Additionally, the Commission remains concerned about the nature and extent, if any, of Dallas M. Tarkenton's involvement in the operations of broadcast stations in which his sons have interests.

Accordingly, in order that the Commission may be more fully informed, Dallas M. Tarkenton is requested to respond to the following:

1. Describe your basis for stating, and provide evidence in support thereof, that the reason Stephen Tarkenton used Dallas M. Tarkenton's Athens, Georgia, address in Stephen Tarkenton's Lafayette, Florida, application (File No. BPH-870720MU) was because Stephen Tarkenton "had a series of temporary addresses at the time"
2. Describe your basis for stating, and provide evidence in support thereof, that "Mr. [Larry] Fuss regularly informed Stephen [Tarkenton] of opportunities for new FM stations in the south."
3. Describe your basis for stating, and provide

amendments must be executed by the applicant or its authorized principal."

5. Describe fully all facts and circumstances involving your role (contemplated and actual) with respect to the attached letter, dated February 20, 1991, from Dallas M. Tarkenton to Bob Thorburn.

Pursuant to § 73.1015 of the Commission's Rules, Dallas M. Tarkenton is requested to respond to the above within 30 calendar days of the date of this letter. Each answer shall be numbered to identify the specific request to which it is intended to respond.

Additional information which you feel may be useful in helping the Commission to make a determination in this matter may be provided. Such additional information may include, at your discretion, a response to the enclosed letter, dated February 24, 1992, from David Tillotson, Esq., on behalf of Design Media, Inc., to Gary P. Schonman, attorney for the Mass Media Bureau.

The failure to respond fully to any request will constitute

ATTACHMENT 5

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

IN REPLY REFER TO:

1800C4

February 10, 1993

Certified Mail - Return Receipt Requested


John S. Neely, Esq.
Miller & Miller
1990 M Street, N.W., Suite 760
Washington, D.C. 20036

Dear Mr. Neely:

The Commission is in receipt of your responses to official letters of inquiry, submitted February 18, 1992, and December 17, 1992, on behalf of Dallas M. Tarkenton. The letters of inquiry were precipitated by concerns that Mr. Tarkenton abused the Commission's processes, was or is an undisclosed real party-in-interest in applications for broadcast facilities filed by or on behalf of one or more of his sons, or otherwise engaged in Commission-related misconduct.

Based on the information currently before the Commission, we find there is no warrant at this time for further action. Accordingly, this matter is hereby closed.

Sincerely,

for 

Charles W. Kelley
Chief, Enforcement Division
Mass Media Bureau

cc: David Tillotson, Esq.
3421 M Street, N.W.
Suite 1739
Washington, D.C. 20007

ATTACHMENT 6

DECLARATION

I, Terry C. Jenks, do hereby declare, under penalty of perjury, that the following is true and correct to the best of my knowledge, understanding, and belief:

1. I am the Terry C. Jenks who filed the "Comments and Counterproposal" in August 1990 before the Federal Communications Commission (FCC or Commission) in a rule making proceeding, MM Docket 90-309. In my Comments and Counterproposal in that proceeding, I proposed that the FCC allot Channel 288A to Bowdon, Georgia, rather than grant proposals filed by Design Media, Inc. ("Design") and Alexander Mitchell Communications Corporation ("AMCC").

2. I have read the Petitions for Reconsideration filed by Design and AMCC. The Design Petition and exhibits contain numerous misstatements, mischaracterizations, and unfounded speculation with respect to me and to matters involving me. The purpose of this Declaration is to set forth the facts.

3. I filed my Comments and Counterproposal because I am seriously interested in building and operating a radio station in Bowdon, Georgia. That is the only reason I participated in the rule making proceeding. As I indicated I would do, I have submitted an application for authority to construct and operate a new FM station on channel 288A in Bowdon, pursuant to the Report and Order that allotted the channel.

4. Design has questioned my interest in applying for the station in Bowdon, asserting that I know nothing about

broadcasting, asserting that I have no personal interest in applying for a station in Bowdon but have pursued the allotment to assist a friend, asserting that I could not possibly get the station because I am not a minority, and asserting that I could not be a serious proponent for Bowdon because I would not yield to the threats and pressure exerted by Design and its agents and allies and agree to be paid off to dismiss my Comments and Counterproposal. Initially, I must say that I did not understand and was never advised that white males cannot obtain a radio station or that I had to know all about the FCC and all of its procedures and all about the radio business before I could try to get into the business, as Design has suggested in its filings. I cannot believe that my sincerity and intent to pursue a Bowdon application will rest on factors such as these.

5. Although Design has devoted considerable fire power to attacking my intentions, Design never sought to ascertain why I was interested in applying for Bowdon or why/whether I wanted to get into broadcast station ownership. Neither Mr. Bolton nor Mr. Bergner nor anyone else ever asked me why I wanted a station

in Nicholasville, Kentucky, and later in Louisville, Kentucky. On both occasions I contacted my long-time friend, Lee Smith, for his advice. I asked for Lee's assistance because he was a friend, an attorney, and someone who has knowledge about the radio business, having worked in radio and owned radio stations.

Design and others just assumed and asserted that I had no such ties because I live in Louisville.

9. I currently work in a business that has in the past often required mobility, and I have lived in many areas. I still consider my home, however, to be in Georgia, where I was born and raised. Bowdon is not far from Atlanta, Georgia. I was born, raised, and went to school in Atlanta. I lived there continuously until I was drafted in 1968, returning there after I left the service in 1971. My mother and three brothers still live there. I have always maintained strong ties to the Atlanta area. In fact, I still own a home and other property in the area. I have kept up business ties in Georgia, maintaining banking relationships with two Georgia banks. As a close friend, Lee knows of my strong ties to Georgia.

10. Although I had looked at existing stations as a possible investment in the past, I had never before looked into the possibility of applying for a new station. When Lee mentioned the opportunity for a new station in Bowdon, I was definitely very interested; but I was dependent upon Lee's advice as to how to proceed. Lee told me I would need an engineer to help me with my filing, and he would recommend one. Lee indicated that he would contact an engineer for me. Sometime later, Lee sent me the draft Comments and Counterproposal. I understood that Lee prepared it for me.

11. Lee Smith never at any time suggested, asked, implored, or urged me to file my Comments and Counterproposal to

benefit anyone other than myself. He never stated, suggested, hinted, or gave me any reason to believe that he or anyone else could or would benefit from my filing to propose a new station at Bowdon. He never suggested to me that I would get anything out of filing the counterproposal other than the chance to apply for, and hopefully get, the Bowdon station. No one has paid or promised to pay me any consideration, directly or indirectly, for my filing. I have paid all of my expenses associated with pursuing the Bowdon allotment, and no one has agreed to reimburse those expenses. The only offers I have received to be paid or reimbursed for my expenses have come from Design and/or persons acting on its behalf. If my filing truly served to benefit anyone else in any way, it was without my knowledge and wholly unintended.

12. I do not know, I have never met, and I have never spoken with Dallas Tarkenton or any of his sons. Tarkenton's name was never even mentioned in any conversation I had with Lee in connection with my filing for Bowdon. Any allegation or suggestion that I filed my Comments and Counterproposal to please, assist, benefit or accommodate Mr. Tarkenton or any of his interests in any way is totally false. I do not have any

can and do emphatically deny and dispute any allegation that

1. [REDACTED] [REDACTED] other than the fact that [REDACTED] [REDACTED]

to get in touch with him immediately to discuss a matter of great importance to his clients. I decided that if Mr. Van Horn did not want to name his clients or say why they wanted to talk to me, I did not need to respond to him, so I didn't.

17. On September 22, 1990, at 12:40 p.m., a man in a dark, double-breasted suit walked down my driveway to where I was kneeling on the ground working on the grass in my backyard (not my garden, which is some 75 feet from where I was working) and introduced himself as Michael J. Bergner. I had never heard of Michael Bergner before and did not know what he wanted. He asked me if I knew why he was there. I paused to put my shirt on and then said no, I did not. He stated that he was from New York and that his client, whom he could not name, felt it was important enough for him to come all this way to ask two things. Bergner seemed to be trying to be intimidating and mysterious at the same time. Design has tried to draw conclusions from the fact that I was surprised to be accosted in this way. Who would not have been surprised? I was surprised and suspicious. I was outraged that a stranger would, unannounced, arrive at my home, accost me in my yard, and demand answers to his intrusive, accusatory question-statements. Nothing in the FCC's processes prepared me to be approached and addressed in this manner. I did not respond to most of his question-statements, because he did not give me a chance to get a word in and I saw no reason to conduct business while working in my yard.

18. Bergner told me that after October 3, 1990, new FCC rules would go into effect that would prevent anyone from making any money on a settlement in the rule making. He then said that, unless I was willing to settle right there, standing in my driveway, I must be a front man for some other party. Bergner said that was illegal, but I would not get caught. In fact, he said, his client was doing the same thing.

19. Bergner said his client had been offered \$35,000 to settle and needed the money but would not get anything if I didn't settle. He asked me if I would go ahead with my application or take the money. He said he wanted to see me get the money. I told Bergner that I was going ahead with my proposal because I thought Bowdon was a good drop in spot for a radio station.

20. Bergner dominated the conversation throughout. He asked his questions in the form of statements and then answered them himself. He was arrogant and tried to intimidate me the whole time. In closing, Bergner said that the "big artillery" would be out after me if I didn't settle by October 3, 1990, and if I thought I was getting mail now, wait until after October 3. All of our conversation was in my driveway. Bergner departed at 1:05 p.m. As he was walking away, Bergner asked for my unlisted phone number, which I gave to him. I never mentioned Lee Smith in this conversation. His name never arose.

21. On September 25, 1990, my mother-in-law received a strange telephone call. During that afternoon, a man called and

did not identify himself but asked to verify her phone number and then asked her, "Do you know someone named Terry?" He then asked, "Do you know someone named Lee?" He did not give out any information. I have since reviewed my long distance phone bill for August, 1990, and the only long distance calls made from my unlisted number were a call to my mother-in-law and a call to Lee Smith. I believe, but cannot prove, that Mr. Bergner or someone acting with the information Bergner gave him (my unlisted phone number) obtained my phone records. I have since checked with the South Central Bell Office and have been told that it would have been possible to obtain such records if the caller represented that he was me.

22. Later on that same day, at 8:00 p.m., September 25, 1990, I answered the phone and the caller identified himself as Leonard Bolton from Design Media of Griffin, Georgia. He said, "We've sent you letters and our attorneys have sent you letters, have you had an opportunity to review them and consider them?" I said yes I have but that I am not considering them. Bolton said, "Why is that?" I said, "Because I want to continue with my application." He asked if I had looked at their alternate proposal and I said I had not yet done so. Mr. Bolton asked me if I was a broadcaster. When I told him no, he said he thought by reading my filing that I might be an engineer. He said he knew an engineer that periodically applied for stations and sometimes got one. Bolton again asked if I was interested in ~~participation~~ and I ~~again~~ told him no. Bolton asked me to keep him

in mind should I change my mind. The conversation ended at 8:02 p.m. Since my phone number is unlisted, and the only person I ever gave it to was Bergner, I believe that Mr. Bolton must have obtained the number from Bergner.

23. On September 28, I placed a call to Jay Baraff, then counsel for Design to discuss the settlement offers. I was told he was gone for the day. Almost immediately thereafter I received a call from Bergner asking me about the settlement.

24. I again placed a call to Jay Baraff on October 1 and left a message for him. Once again, Bergner called me back within a few minutes. These Bergner/Baraff coincidences were beginning to concern me. Mr. Baraff and Mr. Bergner called me several times between October 1 and 3 with offers to settle and a proposed offer was faxed to me. I seriously considered each of these offers, although I do not believe that I was obligated to do so, and I declined them. Much has been stated by Design about the significance of the fact that I was unwilling to accept Design's pay-off offers, unlike Bowdon Broadcasters. I still do not see how one can conclude that the fact that I have insisted that I wanted to proceed with my proposal and not accept pay-off offers could be considered evidence that I was not serious about my proposal. My interest and intent has always been to obtain a radio station. Also, I must admit that the threats and arrogance I experienced from Design and the others who were pressuring me to accept Design's payoff offers did not put me in much of a mood to settle.

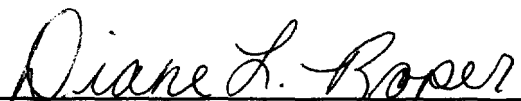
25. On October 3, the date Bergner had told me was a deadline, Mr. Bolton called and left a message on my answering machine threatening me if I did not settle. A few days later, I received a letter from him that I interpreted as a clear threat

CERTIFICATE OF SERVICE

I, Diane L. Roper, a secretary at the law firm of Fletcher, Heald & Hildreth, do hereby certify that true copies of the foregoing "Opposition to Motion to Modify Issues" were sent this 7th day of April, 1993, by first-class United States mail, postage prepaid, to the following:

- * The Honorable Richard L. Sippel
Office of Administrative Law Judges
Federal Communications Commission
2000 L Street, N.W., Room 214
Washington, D.C. 20554
- * James Shook, Esquire
Mass Media Bureau
2025 M Street, N.W., Room 7212
Washington, D.C. 20554
Counsel for the Mass Media Bureau

Audrey P. Rasmussen, Esquire
O'Connor & Hannan
1919 Pennsylvania Ave., N.W., #800
Washington, D.C. 20006
Counsel for Steven L. Gradick



Diane L. Roper

*By Hand Delivery